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In The
SUPREME COURT OF THE UNITED STATES

No. 71-696

OCTOBER TERM, 1971

IN THE MATTER OF
CHARLEY PAUL McLAIN, Bankrupt,
UTICA SQUARE NATIONAL BANK OF TULSA, Creditor
Petitioner

vs.

FRED W. WOODSON, Trustee
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Respondent, Fred W. Woodson, Trustee in the Bankruptcy Matter of Charley Paul McClain, Bankrupt, hereby opposes the Petition for Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit. The Respondent is satisfied with the matters contained in the brief of the Petitioner in relation to Opinions Below, Jurisdiction, Constitutional Provisions, Statutes, and Regulations Involved. Essentially, the Respondent is satisfied with the Statement of the Question Presented for Review, and Statement of the Case, except that the Respondent raises questions herein as to the granting of the Writ and presents this under his own set of Questions Presented for Review. Further, it is asserted that there is no question of a voidable preferential transfer under 11 U.S.C. Secs. 96(a) (1), (a) (2), (a) (7), and (b) and the Respondent takes issue with the Statement of the Case wherein it is stated that the case involves a voidable preferential transfer. It is apparent from the Order of the Referee in Bankruptcy and from the Opinion of the United States Court of Appeals that there is no question of a bankruptcy preference being involved in this case. The case involves merely a question of failure to perfect a security interest in accordance with the laws of the State of Oklahoma, specifically the Uniform Commercial Code.

QUESTIONS PRESENTED FOR REVIEW

I. Is this case, one involving only interpretation and application of State law, specifically the Uniform Commercial Code, an appropriate one for the granting of a Writ of Certiorari.

II. Can parol evidence be introduced to contradict the representations in a security agreement when the party on whose behalf parol evidence is sought to be introduced is a Trustee in Bankruptcy, a third party.

III. Is the assignee of a security agreement a holder in due course of the security agreement.

ARGUMENT

The case presented by the Petitioner is not an appropriate case for the granting of a Writ of Certiorari. The only questions involved in this case concern application and interpretation of State law. In *Wolf v. Weinstein*, 83 S.Ct. 969, 372 U.S. 633, 10 L.Ed.2d 33, this Court, in a bankruptcy case, held that certiorari was improvidently granted where oral argument showed that it was apparent that at the time the writ was granted, the controversy primarily implicated questions of State law and presented no Federal question of substance. In this case, all of the facts are thoroughly set forth in the Order of the Referee and in the opinion of the Court of Appeals for the Tenth Circuit, and it is apparent that this case involves only questions of State law. Further, this Court has recently denied certiorari in three Uniform Commercial Code cases: *Holcomb, Jr. v. Cessna*, cert. den., 92 S.Ct. 62, ____ U.S. ____, 30 L. Ed.2d 56; *Dowell v. Beech*, cert. den., 92 S.Ct. 45, ____ U.S. ____, 30 L.Ed.2d 50; *Bank of America v. United States*, cert. den., 92 S.Ct. 54, ____ U.S. ____, 30 L.Ed.2d 108. It is readily apparent that the instant case stands outside of the boundaries staked out by this Court for the granting of writs of certiorari.

Regardless of any contention on the part of the Petitioner that it should prevail, even if the writ were granted, Oklahoma law is clear and would preclude the reversal of this case. In Oklahoma, the law excluding parol

evidence to vary or contradict a written instrument applies only to controversies between the parties to the instrument and those claiming under them and it has no application in controversies between a party to the instrument and a third party. *In Re. Assessment of Alleged Omitted Property of Kennedy et al, for Taxation in Osage County for 1917*, Okl. 58 P.2d 134.

A creditor holding a security agreement by assignment is not and cannot be a holder in due course of the security agreement. *127 ALR* 190, 191-192. *Commerce Acceptance of Oklahoma City, Inc. v. Elmer E. Henderson*, Okl. 1968, 446 P.2d 297. *Selected Investments Corporation v. Lester*, Okl. 1958, 327 P.2d 668. Accordingly, the authorities cited by the Petitioner to the effect that parol evidence cannot be admitted against a holder in due course would not be in point in this particular case, as the Petitioner is not a holder in due course and to avail itself of this doctrine would have to first show that it is a holder in due course. As stated before, this case does not involve any question of a voidable preferential transfer under the Bankruptcy Act, but involves only the question of the failure to perfect a security interest under the laws of the State of Oklahoma. The Respondent Trustee in Bankruptcy occupies the position of a third party under the provisions of Section 70, sub. c. of the Bankruptcy Act, 11 U.S.C.A. Section 70, sub. c.

CONCLUSION.

This Court should deny the granting of a Writ of Certiorari, and allow the judgment of the Court of Appeals to be thereby affirmed.

Respectfully submitted,

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